(9th Cir. 1998). In fact, "[t]he [Interstate Commerce Act of 1887 ("ICA"), Pub. L. No. 49-104, 24 Stat. 379], * * * which, as amended, still governs federal regulation of railroads, has been recognized as 'among the most pervasive and comprehensive of federal regulatory schemes.'" *City of Auburn*, 154 F.3d at 1029 (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)).

As Congress has explained, over time "[t]he combination of * * * onerous Federal regulations and stiff competition from the motor carrier industry proved lethal for the railroads; by the 1970s, the railroad industry was on the brink of financial collapse." H.R. REP. NO. 104-311, at 90 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 802. Thus, starting with the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 194, Congress "began the substantial economic deregulation of the surface transportation industry." H.R. REP. NO. 104-311, at 82, 1995 U.S.C.C.A.N. at 793-794.

Congress continued this process of deregulation in the ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, *codified in relevant part at* 49 U.S.C. §§ 701-727, 10101-11908, which abolished the Interstate Commerce Commission ("ICC") and transferred a portion of the ICC's regulatory functions to the STB.[1] The ICCTA "builds on the deregulatory policies that have promoted growth and stability in the surface transportation sector. * * * The [Act] keeps bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate." H.R. REP. NO. 104-311, at 93, 1995 U.S.C.C.A.N. at 805.

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[1] Under the ICA, as amended by the ICCTA, the STB regulates the construction, operation, and abandonment of rail lines (49 U.S.C. §§ 10901-10907), railroad rates and service (49 U.S.C. §§ 10701-10747, 11101-11124), and rail carrier consolidations, mergers, and common control arrangements (49 U.S.C. §§ 11323-11327).

2. It has long been understood that *state* regulation of the railroad system would, in many instances, undermine the *federal* regulatory scheme. See *Kalo Brick*, 450 U.S. at 318. Thus, the history of railroad regulation since the passage of the ICA in 1887 has been one of steady erosion of state regulatory authority. The original ICA gave the ICC significant powers that supplanted some state regulation. See *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456, further enlarged the ICC's powers and diminished the regulatory sphere of the states. And with the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, Congress further limited the regulatory authority of the states, while also substantially reducing the amount of federal regulation. See *ICC* v. *Texas* ("*Texas*"), 479 U.S. 450, 460-461 (1987).

Prior to 1980, although the federal government had the responsibility under the ICA to regulate the railroad system, the states were heavily involved in *intrastate* rail regulation. In the Staggers Act, Congress provided that, in general, state regulatory commissions could continue to regulate only if they applied federal standards. See *Texas*, 479 U.S. at 452-454. The states, however, still at that time retained the right to regulate the "construction, acquisition, operation, abandonment, or discontinuance of [intrastate] spur, industrial, team, switching, or side tracks," over which the ICC had no licensing authority. 49 U.S.C. § 10907(b)(1) (1982); *Ill. Commerce Comm'n* v. *ICC*, 879 F.2d 917, 922-23 (D.C. Cir. 1989).

As part of the ICCTA, enacted in 1995, Congress terminated entirely even this residual regulatory authority of state and local governments over rail operations. The Senate Report on the ICCTA explained this decision, which was the culmination of a long and deliberate process beginning with the passage of the ICA more than a century before:

> The railroad system in the United States is a nationwide network. The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would waken [sic] the industry's efficient and competitive viability.

S. REP. NO. 104-176, at 6 (1995).

Thus, former Section 10501(c), which had expressly reserved the states' power to regulate intrastate transportation, was eliminated. Also eliminated was former Section 10103, which had stated that the federal remedies provided in the ICA were "in addition to remedies existing under another law or at common law." Finally, the express preemption provision of the Act, Section 10501(b), was strengthened. As amended by the ICCTA, it now provides:

> The jurisdiction of the Board over—
>
> > (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclu-

> sive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). For purposes of Section 10501(b), the term "transportation" is defined broadly to include all of the related facilities and services used for that transportation. See 49 U.S.C. § 10102(9).[2]

Section 10501(b) thus makes the STB's "jurisdiction" over *all* rail transportation and rail transportation facilities—including even entirely intrastate ancillary facilities and track over which the states formerly had regulatory authority—"*exclusive.*" *Ibid.* (emphasis added).

As the courts have repeatedly observed, "'[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations'" than this statutory provision. Pet. App. 15a (quoting *CSX Transp., Inc.* v. *Ga. Pub. Serv. Comm'n* ("*CSX*"), 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)); see also *City of Auburn*, 154 F.3d at 1030 (same). Congress, too, has recognized the extraordinary breadth of Section 10501(b). As it explained in the House Report accompanying the ICCTA,

> [Revised Section 10501] reflect[s] the *direct and complete preemption* of State economic regulation of railroads. * * * Although States retain the police

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[2] Section 10102(9) defines "transportation" to "include[]":

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9). See Pet. App. 2a.

> powers reserved by the Constitution, *the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.*

H.R. REP. NO. 104-311, at 95-96, 1995 U.S.C.C.A.N. at 807-808 (emphasis added). As Congress also stressed, this broad preemption of state regulation is necessary to preserve the free flow of interstate commerce and to prevent the "balkanization" of rail regulation. *Ibid.*[3]

3. Although, pursuant to the ICCTA, the states no longer have the authority to regulate "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State" (49 U.S.C. § 10501(b)(2)), Congress also chose

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[3] The House Report addresses a slightly earlier version of the statute than the one that was eventually enacted as the ICCTA. In that version, the language that became Section 10501(b) was split into two sections, 10103 & 10301(b). However, the text of Section 10501(b) in the enacted version contains exactly the same language as these earlier provisions, and therefore the House Report is directly applicable.

Petitioners cite to the Conference Report that also accompanied the ICCTA for the propositions that "'the exclusivity [of federal law mandated by the ICCTA] is limited to remedies with respect to rail regulation—not State and Federal law generally,'" and that "Congress did not intend to preempt laws that 'do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.'" Pet. 4-5 (quoting H.R. CONF. REP. NO. 104-422, at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852). However, petitioners ignore the specific examples of such laws that are included in the Conference Report: "criminal statutes governing antitrust matters not preempted by [the ICCTA], and laws defining such criminal offenses as bribery and extortion." H.R. CONF. REP. NO. 104-422, at 167, 1995 U.S.C.C.A.N. at 852. These examples clarify the narrow scope of the laws that Congress believed would not be preempted by the ICCTA—basically, the states' generally applicable police powers to the extent that those police powers do not impose a substantial burden on rail transportation. See Pet. App. 10a; page 12, *infra*.

not to give the STB licensing authority over these ancillary rail facilities and tracks. See 49 U.S.C. § 10906 ("The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."). Instead, as part of its decision to make rail regulation entirely federal and to lessen the regulatory burden on railroads (see pages 2-4, *supra*), Congress expressly chose to leave these projects unregulated. See 49 U.S.C. § 10501(b). As Congress explained in the House Report accompanying the ICCTA, "[t]he bill is intended to standardize all economic regulation (*and deregulation*) of rail transportation under Federal law." H.R. Rep. No. 104-311, at 95, 1995 U.S.C.C.A.N. at 807 (emphasis added).

B. Vermont's Act 250.

Vermont's environmental land-use statute, Act 250, codified at Vt. Stat. Ann. Tit. 10 § 6001 *et seq.*, "mandates preconstruction permits for land development." Pet. App. 3a; see also *In re Spring Brook Farm Found., Inc.*, 671 A.2d 315, 317 (Vt. 1995); Pet. 5. The Act sets forth an elaborate and cumbersome system for the consideration of any permit application.

In particular, under Act 250, local "District Commissions" composed of three appointed public representatives evaluate projects based on ten statutory criteria, such as a project's effect on "'water or air pollution'" and on "'the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.'" Pet App. 3a-4a (quoting Vt. Stat. Ann. Tit. 10 § 6086(a)(1), (8)).

Various "statutory" parties—including local municipalities, local municipal planning commissions, and any affected state agencies—are entitled to participate fully in the hearing on an Act 250 permit application. See Vt. Stat. Ann. Tit. 10 §§ 6084-6085. Neighboring landowners, too, are entitled to participate if they can show that a permit may have a direct

effect on their property with reference to any of the 10 statutory criteria (including "aesthetics")—as can any other individual or organization that can plausibly assert an interest in the Commission's consideration of the permit. See *ibid.*

In reviewing an application, the District Commission may craft specific "requirements and conditions" for any development permit. See Vt. Stat. Ann. Tit. 10 § 6086(c). Any party to a permit hearing is entitled to offer evidence on why a permit should not be issued or to propose specific conditions that should be imposed on that permit. *Id.* §§ 6085-6086. Once a District Commission decides whether to issue an Act 250 permit and what conditions to impose on that permit, either the applicant or any of the statutory parties may appeal the Commission's decision to the State Environmental Board and from there to the State Supreme Court. See Pet. App. 3a-4a; Vt. Stat. Ann. Tit. 10 §§ 6085(c), 6089. Projects about which there is any dissent from any of these numerous parties can be delayed for years. Cf. Pet. App. 4a n.1.

C. Factual Background.

1. Respondent Green Mountain Railroad Corporation ("Green Mountain") is a Class III rail carrier (as defined by 49 U.S.C. § 10102(5) and 49 C.F.R. § 1201.1-1(a)) regulated by the STB. It operates approximately 52 miles of track between Rutland, Vermont and Cold River, New Hampshire, on which it offers both freight and passenger rail service as part of the interstate rail network. Pet. App. 3a. In particular, Green Mountain uses this line to serve shippers and to transload goods, *i.e.*, to move freight between rail cars and trucks. See *ibid.*

Green Mountain owns a 66-acre facility known as "Riverside," in Rockingham, Vermont, which is bounded by its rail line and the Connecticut River. Pet. App. 3a. In connection with its rail operations, Green Mountain has built or proposed building tracks and facilities on the site to support three types of operations involving the transloading of freight

between rail and trucks: (i) unloading bulk salt arriving by rail car either directly into trucks or into a storage shed until truck distribution occurs; (ii) unloading and temporarily storing non-bulk goods, such as steel pipe and lumber, awaiting truck transport; and (iii) unloading bulk cement arriving by rail car either directly into trucks or into storage silos awaiting truck distribution. See Pet. App. 3a. There is no dispute that all of these transloading operations fall within the ICCTA's expansive definition of "transportation," 49 U.S.C. § 10102(9).[4] There is also no dispute that Riverside is the only site on the Green Mountain line with sufficient space to accommodate Green Mountain's transload needs on a growth basis. See 2d Cir. J.A. at A-293.

In 1997, PMI Lumber Transfer, Inc. ("PMI"), a corporation that at the time leased a portion of Riverside to operate a forest-products distribution yard, sought an Act 250 permit to construct an office building on the site. See Pet. App. 4a. The local District Commission granted the requested permit, but in so doing insisted on a number of conditions, including a 100-foot buffer zone along the Connecticut River that would render the majority of the Riverside site unusable for rail operations. Thereafter, Green Mountain also sought several Act 250 permits for development projects related to its transloading operations—such as permits to build a new storage shed for bulk salt—but when the requested permits either were not issued or were issued only subject to burdensome conditions, Green Mountain ceased to participate in the Act 250 permitting process. *Id.* at 5a.[5] After the state cited Green Mountain

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[4] See Pet. 26 n.11; see also, *e.g.*, 49 U.S.C. § 10102(9)(B) ("transportation" defined to include the services provided by, and the facilities used by, rail carriers); *Green Mountain R.R. Corp.—Petition for Declaratory Order*, STB Fin. Dkt. No. 34052, 2002 WL 1058001, at *4 (served May 28, 2002); Pet. App. 7a-8a.

[5] As the Association of American Railroads ("AAR") explained in its amicus brief in the Second Circuit, voluntary notification of potential projects is the norm in the industry—railroads are not averse to working

for several asserted violations of Act 250, Green Mountain filed this declaratory action seeking a ruling that Act 250 was preempted by the ICCTA as applied to its rail transloading operations at Riverside.[6]

2. The district court granted Green Mountain summary judgment on the ground that Section 10501(b) preempts the Act 250 permitting process as applied to Green Mountain's use and expansion of the Riverside facility. Pet. App. 17a. It noted that "[w]hen Green Mountain and PMI, a non-railroad business, jointly operated at Riverside, the site arguably had been partially subject to Act 250 regulation, a[t] least so far as PMI's activities were concerned." Pet. App. 22a. But, the

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cooperatively with local authorities to resolve critical local concerns—and discussions between railroads and local authorities resolve most local conflicts. See AAR 2d Cir. Br. 3. In fact, the district court recognized that "local governments may require railroads such as Green Mountain, in advance of construction, to 'share their plans with the community, when they are undertaking an activity for which another entity would require a permit.'" Pet. App. 27a (quoting *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 458685, at *7 (served April 30, 2001). But voluntary discussions concerning railroad projects would often be fruitless without the recognition by local authorities that the national interest in an efficient and economically robust interstate rail system takes precedence over their parochial interests. See AAR 2d Cir. Br. 3. Thus, such discussions are, in fact, only voluntary.

[6] Green Mountain also sought declaratory relief from the STB, which the Board denied because the district court had "made clear its desire to resolve the issues raised without referring the matter to the Board." See *Green Mountain*, STB Fin. Dkt. No. 34052, 2002 WL 1058001, at *3; Pet. App. 20a. Nonetheless, the STB "summarize[d] relevant court and agency case law addressing similar situations" "to provide guidance to the Court and to the parties" regarding the nature and extent of Section 10501(b) preemption. *Ibid.* The Board explained that "State and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with rail transportation by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations" *Ibid.*

court explained, this was no longer true once PMI ceased operating at the site. "It is clear that * * * [states] may not apply a law like Act 250 [to rail transportation projects] so as to require pre-construction approval and permitting. Such a procedure is preempted by the ICCTA." *Id.* at 28a. The court noted that "[w]hile the state has the right to review [development] plans, it cannot, consistent with ICCTA preemption, require Green Mountain to secure Act 250 permits before commencing construction." *Id.* at 30a.

The court of appeals affirmed.[7] The court stressed that "the plain language [of the ICCTA] grants the [STB] wide authority over the transloading and storage facilities undertaken by Green Mountain." Pet. App. 7a. Based on its analysis of the broad statutory language and a variety of lower-court and STB decisions finding local permitting requirements for railroad facilities to be preempted, the court held that "Act 250's preconstruction permitting requirement is preempted" by Section 10501(b). *Id.* at 8a-10a. The court identified two distinct reasons why Act 250 and similar permitting schemes are preempted: "(i) [they] unduly interfere[] with interstate commerce by giving the local body the ability to deny the carrier to right to construct facilities or conduct operations, and (ii) [they] can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely." Pet. App. 10a (citations omitted).

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[7] The STB filed an *amicus* brief in the Second Circuit urging affirmance and stressing that "49 U.S.C. 10501(b) preempts all state and local permitting for rail construction and improvement activities." STB 2d Cir. Br. 1. As the Board explained, "Riverside is clearly a facility used in transportation by a rail carrier. Moreover, the transloading operations at Riverside are services related to the movement of property. Thus, a state or local permitting process for prior approval of the Riverside project is by its nature inconsistent with exclusive Board jurisdiction. Accordingly, the State's attempt to apply Vermont's land use permitting process to Green Mountain Railroad's facility is necessarily preempted." *Id.* at 12 (citations omitted).

Like the district court (see Pet. App. 25a) and the STB (see *Green Mountain*, 2005 WL 1058001, at *4), the court of appeals emphasized that "not all state and local regulations are preempted by [the ICCTA]; local bodies retain certain police powers which protect public health and safety." *Id.* at 10a (citations and internal quotation marks omitted). For example, "[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, nondiscriminatory regulations would seem to withstand preemption." *Ibid.* (citing *Vill. of Ridgefield Park* v. *New York, Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 64 (N.J. 2000)). But by contrast, pre-construction permitting processes are necessarily preempted by the ICCTA. *Ibid.*

Finally, the court of appeals rejected petitioners' several arguments against preemption. First, the court explained that it "is the permitting process itself" that is preempted by the ICCTA, "not the length or outcome of that process in particular cases"—and thus the fact that in any given case the permitting authority *might* approve an application does not render the permitting process itself permissible. Pet. App. 11a-13a. Second, the court rejected the state's attempt to defend the application of Act 250 to Green Mountain's rail operations on the ground that Act 250 "is an environmental, rather than economic, regulation." *Id.* at 13a. As the court noted, "[t]he distinction is not useful. 'If local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.'" *Ibid.* (quoting *City of Auburn*, 154 F.3d at 1031). Finally, the court distinguished a prior Second Circuit case addressing the section of the ICCTA that delineates preemption in the context of motor carrier operations, 49 U.S.C. § 14501. See Pet. App. 15a. The court noted that preemption under Section 14501 is far narrower than preemption under Section 10501(b) and stressed that "'[i]t is difficult to imagine a

broader statement of Congress's intent to preempt state regulatory authority over railroad operations'" than Section 10501(b). Pet. App. 15a (quoting *CSX*, 944 F. Supp. at 1581).

REASONS FOR DENYING THE PETITION

Petitioners' primary argument in favor of certiorari is that there is a conflict among the lower courts over the preemptive scope of Section 10501(b). As we demonstrate in Part I, that conflict simply does not exist. Petitioners' policy arguments for review are similarly baseless. See Part II, *infra*. And as we explain in Part III, the lower court's decision was clearly correct. Thus, there is no reason for this Court to grant certiorari.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS OVER WHETHER SECTION 10501(b) PREEMPTS PRE-CONSTRUCTION PERMITTING PROCESSES AS APPLIED TO RAIL TRANSPORTATION ACTIVITIES AND FACILITIES THAT FALL WITHIN THE STB'S EXCLUSIVE JURISDICTION.

Petitioners identify a number of decisions with which, they assert, the Second Circuit's decision conflicts—going so far as to claim that courts "have repeatedly disagreed over the preemptive force of Section 10501(b) of the ICCTA." Pet. 10. But wishing does not make it so. In fact, the lower courts are not split at all over the question presented in this case. Instead, courts consistently have held that state permitting processes are preempted by Section 10501(b) for rail transportation facilities and services that fall within the exclusive jurisdiction of the STB.

The seminal case on the subject is *City of Auburn*, 154 F.3d 1025, which addressed whether The Burlington Northern and Santa Fe Railway could be required to comply with local environmental-review permitting processes before undertaking a variety of repairs and improvements on a rail line that passed through Auburn, Washington. The court held

that, as applied to these obviously transportation-related activities, these permitting processes were preempted by Section 10501(b). See *id.* at 1029-1031. In so holding, the court reviewed the text and history of the ICCTA and repeatedly stressed the broad nature of ICCTA preemption. See *ibid.*[8]

The holding in *City of Auburn* is by no means contentious. In fact, the two courts of appeals to consider the question—the Ninth Circuit and the Second Circuit in this case—both have so held.[9] So too have all other courts that have considered the issue, which consistently have held that state and local zoning, land use, building permit, and demolition laws and regulations are preempted insofar as they could in-

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[8] Petitioners assert that "[t]he Second Circuit's reliance on *City of Auburn* [in this case] was misplaced because the Ninth Circuit's ruling turned on the presence of an additional and broader preemption provision of the ICCTA that is not at issue here." Pet. 12 n.6. But that provision, 49 U.S.C. § 11321(a)—which addresses preemption in the context of railroad mergers or acquisitions (see 154 F.3d at 1030)—was merely an *additional* basis for finding preemption. The Ninth Circuit plainly focused on preemption under Section 10501(b) (see 154 F.3d at 1029-1031), and thus the Second Circuit appropriately relied on the Ninth Circuit's decision.

[9] The Fifth and Third Circuits have decided related questions entirely consistently with these decisions. In particular, although *Friberg* v. *Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), did not involve a prior permitting statute, the court in that case held that a state statute imposing restrictions on railroad operations was expressly preempted, explaining that "it is beyond peradventure that regulation of [the railroad's] train operations, as well as the construction and operation of the [railroad's] side tracks, is under the exclusive jurisdiction of the STB." See *id.* at 443. And in *Hi Tech Trans, LLC* v. *New Jersey*, 382 F.3d 295 (3d Cir. 2004), the Third Circuit held that Section 10501(b) did not preempt state permitting and licensure requirements for a solid waste disposal facility independently operated by a non-railroad on the ground that the "facility [did] not involve 'transportation by rail carrier'" as defined in the ICCTA. *Id.* at 308. Implicit in that decision was the court's understanding that had the facility fallen within the scope of the STB's exclusive jurisdiction over transportation-related activities and operations, the state's permitting scheme would have been preempted.

terfere with railroad construction projects or operations. See, *e.g.*, *Canadian Nat'l Ry. Co.* v. *City of Rockwood*, 2005 WL 1349077, at *4 (E.D. Mich. June 1, 2005) (local permitting requirements preempted as applied to railroad transload facilities); *Flynn* v. *BNSF Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000) (STB has exclusive jurisdiction over construction and operation of fueling facility and local permitting requirements are therefore preempted—even if STB does not regulate such construction or operations); *Soo Line R.R.* v. *City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local demolition permitting requirements expressly preempted as applied to railroad buildings); *Norfolk S. Ry. Co.* v. *City of Austell*, 1997 WL 1113647 (N.D. Ga. Aug. 18, 1997) (local zoning and land use regulations preempted).[10]

The STB, too, has read Section 10501(b) broadly to preempt any kind of local permitting or regulatory requirement that could stymie a railroad's construction or operating plans. See, *e.g.*, *N. San Diego County Transit Dev. Bd.—Petition for Declaratory Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265 (served Aug. 21, 2002) (California Coastal Commission regulation of construction of rail siding preempted); *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Fin. Dkt. No. 33971, 2001 WL 1174385 (served Oct. 5, 2001) (state and local permitting and environmental review of construction and operation of railroad intermodal facility preempted); *Borough of River-*

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[10] Cf. *Wis. Cent. Ltd.* v. *City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wisc. 2000) (ICCTA reflects express, field, and conflict preemption; state attempt to use condemnation law to condemn an actively used railroad passing track preempted); *CSX*, 944 F. Supp. at 1581 (state regulation of closing of railroad station agencies preempted); *Vill. of Ridgefield Park*, 750 A.2d at 67 (complaints under local "nuisance" law preempted as applied to railroad maintenance facility); *Cedarapids Inc.* v. *Chicago Cent. & Pac. R.R.*, 265 F. Supp. 2d 1005, 1013-1014 (N.D. Iowa 2003) (preemption under Section 10501(b) applies broadly to operations on both main line and ancillary spur and industrial track).

dale—Petition for Declaratory Order—The New York, Susquehanna, & W. Ry. Corp., STB Fin. Dkt. No. 33466, 1999 WL 715272 (served Sept. 10, 1999) (local zoning and land use constraints concerning railroad's construction and operation of transload facility preempted); *Cities of Auburn & Kent, WA—Petition for Declaratory Order—Burlington N. R.R. Co.—Stampede Pass Line*, STB Fin. Dkt. No. 33200, 1997 WL 362017, at *4 (served July 2, 1997) (local permitting process for prior approval of plans to modernize rail line preempted), *aff'd, City of Auburn*, 154 F.3d 1025.

Petitioners identify five cases that they assert conflict with this well-established rule. See Pet. 12-21. In fact, none of these cases is in any way inconsistent with it.

In particular, nothing in the Vermont Supreme Court's decision in *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000), suggests that states may require railroads to submit to preconstruction permitting processes for transportation projects within the STB's jurisdiction.

Vermont Railway involved Burlington, Vermont's attempt to continue to apply its zoning ordinances to development activities at a site owned by the railroad after passage of the ICCTA. Located on that site were "antique shops, a roofing company, metal works, storage facilities, a salt shed, and semi-tractor storage." *Id.* at 651. Vermont Railway also "use[d] the property for storage and transfer of freight" and "store[d] equipment at the facility and under[took] repairs there." *Ibid.*

As the Vermont Supreme Court noted, "mere ownership of a business enterprise by a railroad does not exempt that enterprise from all state or local regulation." *Id.* at 654 (internal quotation marks and citation omitted). For example, there is no question that Burlington could rely on its zoning or environmental permitting ordinances to control the development or redevelopment of "antique shops" or a "roofing company." This follows because Section 10501(b) gives the STB

exclusive jurisdiction *only* over "transportation by rail carriers" and the assorted tracks and facilities necessary for that "transportation." 49 U.S.C. § 10501(b).[11]

Thus, what the *Vermont Railway* case involved was the Vermont Supreme Court's attempt to draw a line between those activities that could properly be subject to the city's zoning regulations and those that, instead, fell within the STB's exclusive jurisdiction. In particular, consistent with the statute's plain language that Section 10501(b) only applies to rail "transportation" as that term is defined in the ICCTA, the court approved the application of Burlington's zoning ordinance only insofar as it addressed what the court characterized as "conditions [that] do not interfere with *railway* operations" (769 A.2d at 655 (emphasis in original)), such as "routing of trucks leaving the facility" or "the hours during which trucking can occur at the facility" (*ibid.*). Nothing in the court's decision suggests that the city could require the railroad to participate in a pre-approval permitting process for those activities that indisputably constitute "transportation by rail carrier[]" (49 U.S.C. § 10501(b)(1)).[12]

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[11] See, *e.g.*, *Hi Tech*, 382 F.3d at 308 (no preemption where non-railroad activities in rail yard are not within the exclusive jurisdiction of the STB); see also *Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson Cty., NJ*, STB Fin. Dkt. No. 34192, 2002 WL 31595417, at *2-*3 (served Nov. 20, 2002) (same).

[12] The line between what is and is not rail "transportation" as that term is broadly defined in 49 U.S.C. § 10102(9)—and thus what forms of activity by a railroad may properly be regulated by the states and what are, instead, within the STB's exclusive jurisdiction—can, of course, be difficult to determine in some instances. See, *e.g.*, Pet. App. 27a ("fact-bound question"). It is unclear from the decision, but the *Vermont Railway* court may have drawn that line in slightly the wrong place. See, *e.g.*, 769 A.2d at 655 (affirming the applicability of portions of the city's zoning ordinance to a "salt shed," but never explaining how that salt shed was used). Even if that were true, however, it is unrelated to the question presented in the petition for certiorari in this case and is no justification for the Court to grant review here. In particular, what constitutes rail transporta-

In fact, throughout this litigation petitioners have ignored the critical fact that ICCTA preemption is limited to *rail transportation activities*. In the Second Circuit, petitioners went so far as to assert that, if our interpretation of Section 10501(b) were correct, "[i]f a railroad wanted to construct a *ski resort* at the terminus of a rail line, the project would be immune to local zoning and Act 250 permitting requirements." Vt. 2d Cir. Br. 42 (emphasis added). But that is obviously false; the mere fact that a multinational corporation owned one rail line subject to STB jurisdiction would not suddenly exempt all of its entirely unrelated activities nationwide from all state or local regulation. Rather, only those specific projects or activities that fall within the STB's "exclusive" "jurisdiction" (49 U.S.C. § 10501(b)) are exempt from state or local regulation. That determination may be difficult to make at the margin—and may need to be litigated on a case-by-case basis before courts or the STB—but the appropriate question is whether a specific project falls within the STB's jurisdiction, not whether states may require railroads to engage in permitting or zoning processes for projects that indisputably fall within the STB's jurisdiction.

This basic proposition explains petitioners' remaining cases as well. For example, *Florida East Coast Railway* v. *City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), involved a site owned by a railroad that historically had been used for intermodal operations subject to the STB's jurisdiction (see *id.* at 1326), but that by the time of the litigation

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tion is a highly fact-bound issue. Cf. *Vermont Railway*, 769 A.2d at 655 (lamenting the "limited facts submitted to the trial court by the parties"). More importantly, in this litigation petitioners have never disputed that *all* of Green Mountain's services and activities at Riverside fall within the STB's "exclusive" jurisdiction over transportation by rail carrier. See note 4, *supra*. Rather, petitioners have only questioned the lower courts' holding that, for activities that *do* constitute rail transportation as defined in the ICA and thus fall within the STB's jurisdiction, states may not require railroads to participate in pre-construction permitting programs.

was instead leased by the railroad to a third party—Rinker—for use for an "aggregate distribution business" (*id.* at 1327). The property was not zoned for such a business, and thus the city issued cease-and-desist orders. See *ibid.* The court of appeals held that "*Rinker's* activities at the [site] were not 'rail transportation,'" and therefore that "ICCTA's pre-emption of state regulation of rail 'transportation'" did not preclude the city from requiring Rinker to comply with its zoning ordinances. *Id.* at 1336-1337 (emphasis added). The court stressed, however, that those ordinances "might or might not be pre-empted" had the railroad *itself* operated the facility (*ibid.*), and noted that "the City does not impose its generally applicable zoning ordinances against [the railroad]" (*id.* at 1331).[13]

The Alaska Supreme Court's decision in *Native Village of Eklutna* v. *Alaska Railroad Corp.*, 87 P.3d 41 (Alaska 2004), is also consistent with the Second Circuit's decision in this case. In *Native Village of Elkutna*, the Alaska Railroad owned a site on which there had long been a granite quarry. For years the railroad had leased the property to a third party that conducted "commercial quarrying operations" on the facility "in exchange for the Railroad receiving royalty payments." *Id.* at 44. After the Alaska courts held that this quarrying activity violated local zoning laws, the railroad started mining the quarry itself. See *ibid.* Unsurprisingly, the Alaska

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[13] Although there is some dictum in *Florida East Coast* that arguably espouses a fairly narrow view of ICCTA preemption (see Pet. 16-17), the court expressly limited its holding to the question whether ICCTA pre-emption precludes the application of zoning and permitting ordinances to activities that do not fall within the STB's jurisdiction over "transportation." In fact, the Court cited *City of Auburn* for the proposition that a "local environmental regulation applied against [a] railroad" could be "pre-empted by ICCTA." *Fla. E. Coast*, 266 F.3d at 1331-1332 (citing *City of Auburn*, 154 F.3d at 1029-1031). Thus, petitioners' are flatly incorrect in asserting that *Florida East Coast* "directly conflicts" (Pet. 17) with this case or with *City of Auburn*.

Supreme Court held that the zoning laws still applied despite this change. As the court explained, "Congress did not intend ICCTA to preempt state or local regulation with only 'a remote or incidental effect on rail transportation,'" such as by affecting the railroad's profits from a non-rail business. *Id.* at 57 (quoting *Fla. E. Coast*, 266 F.3d at 1331). But the court nowhere addressed the question addressed by the Second Circuit in this case—that is, whether railroads may be required to participate in a pre-approval permitting process for activities that plainly *are* part of "transportation" by rail carrier as defined in the ICA, and thus that fall within the STB's exclusive jurisdiction.

Iowa, Chicago & Eastern Railroad v. *Washington County*, 384 F.3d 557 (8th Cir. 2004), and *Home of Economy* v. *Burlington Northern Santa Fe Railroad*, 694 N.W.2d 840 (N.D. 2005)—which petitioners discuss at pages 19-21 of the petition for certiorari—are even further afield from this case. In fact, neither case involves a permitting process at all, let alone addresses the question whether Section 10501(b) preempts such systems with respect to transportation-related projects.

Rather, *Washington County* addressed the interaction between the ICCTA and the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, as applied to highway bridges over rail tracks. See 384 F.3d at 560-562. As the Eighth Circuit's decision establishes, that is an extremely complicated question—but one that has nothing whatsoever to do with this case.[14]

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[14] The Eighth Circuit's subsequent decision in *City of Lincoln* v. *STB*, 414 F.3d 858 (8th Cir. 2005), though also not addressing whether the ICCTA preempts permitting processes, demonstrates that the Eighth Circuit is firmly in the mainstream in its analysis of Section 10501(b). Citing *City of Auburn*, the Eighth Circuit stressed the broad scope of ICCTA preemption (see *id.* at 861), and held that a city has no authority to con-

Home of Economy, too, is simply off point. The case involved the question whether a private landowner could sue a railroad for damages and injunctive relief after the railroad closed a grade crossing leading to the landowner's business. See 694 N.W.2d at 841. Like the question presented in *Washington County*, this has nothing whatsoever to do with the validity of pre-construction permitting programs as applied to rail transportation. Furthermore, the North Dakota Supreme Court held that ICCTA preemption did not apply in this instance because the ICCTA "does not explicitly grant the [STB] *exclusive jurisdiction* over grade crossings." *Id.* at 844 (emphasis added). In other words, the court held that grade crossings do not fall within the scope of the Board's exclusive jurisdiction under Section 10501(b)—from which it necessarily follows that Section 10501(b) would not preempt state law. The court also stressed that the case involved the "states' traditional *police power* regarding grade crossings." *Id.* at 846 (emphasis added). As we discussed above (at 12), all courts—including the Second Circuit in this case—agree that "local bodies retain certain police powers which protect public health and safety" even with respect to activities related to rail transportation. See Pet. App. 10a. The *ex post* analysis of whether a specific exercise of a state's police power is preempted by the ICCTA is far different from the question whether pre-construction permitting systems are preempted. Nothing in *Home of Economy* addresses preemption of permitting processes, and thus petitioners' assertion that *Home of Economy* conflicts with the decision below is baseless.

* * * * *

Petitioners have taken a diverse set of cases addressing a number of issues bearing no relation to each other—except

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demn a portion of a railroad's right-of-way that the railroad explained *might* in the future be used for transportation-related projects. *Ibid.*

that one party in each case happens to be a railroad—and have spent a great deal of effort to present the cases as being in direct conflict with the Second Circuit's decision in this case. But petitioners acknowledge that the question presented in this litigation is whether, "[a]s applied to railroads, * * * pre-construction permitting programs [are] *per se* preempted by 49 U.S.C. § 10501(b)." Pet. i. As we have shown, no court has held that such permitting programs are *not* preempted with respect to transportation activities within the STB's exclusive jurisdiction. The purported conflict simply does not exist, and this Court's review is therefore unwarranted.

II. PETITIONERS' POLICY ARGUMENTS FOR REVIEW ARE BASELESS.

Petitioners also argue that this Court should grant review because the lower court's decision "eviscerates state and local authorities' historic police powers," and because the question presented "is a recurring issue that has been subject to ample analyses by the lower courts." Pet. 21-22. Neither argument is valid, and thus neither presents an adequate ground for further review.

For starters, petitioners vastly overstate the effect of the court of appeals' decision on the states' police powers. As the lower court explained (see Pet. App. 10a), in many instances the states' generally applicable police powers *can* be applied against railroads even though regulatory permitting processes are *per se* preempted. In particular, states may seek to enforce nondiscriminatory state and local requirements that do not depend on a preclearance or permitting process, such as building and electric codes. See page 12, *supra*; *Town of Ayer*, 2001 WL 458685, at *7.

Petitioners suggest that there would be little harm in making the railroad go through a preclearance process, especially in instances where the railroad would not need a license from the Board. But Congress's choice to restrict the states' ability to impose zoning and permitting requirements

on railroads—even to the extent that choice limits the states' historic police powers—is entirely justified; it was critically necessary to promote a uniform national rail system that will meet the transportation needs of interstate commerce. See S. REP. NO. 104-176, at 6 (1995). Petitioners' single-minded focus on local concerns ignores the fact that Congress's purpose in Section 10501(b) was to ensure that the national interest in an efficient, uniformly regulated and financially healthy rail system take precedence over parochial interests.

The hundreds of railroads operating across the United States form an intricate, largely fixed network of rail lines with critical intersecting points where traffic can be interchanged, rerouted, loaded, or transferred to another transportation mode. When most of the original lines and yards were constructed, the country was relatively sparsely populated, roads were bad or nonexistent, and, absent a waterway, no other long-distance transportation option was economical. Towns and cities naturally sprung up along railroad tracks, and they particularly concentrated at the places where goods and people could be loaded, unloaded, rerouted, or transferred to a boat or ship. When highways were built, including those that eventually formed the interstate highway system, they often paralleled rail lines and connected the same population and industrial centers that had grown up around the railroads. See AAR 2d Cir. Br. 1-2.

Rail lines cannot be picked up and moved from the communities, streets, and highways that have sprung up around them. Nor can they be moved from the rivers that historically provided the most natural location—both from an engineering standpoint and from a commercial standpoint—for many of those lines. Thus, most existing rail yards and intermodal facilities are located in urban or suburban areas of the country, and the most advantageous locations for new, expanded, or renovated facilities are usually in the same urban or suburban areas. See *ibid.* Rarely are such locations far from a residential or retail community. Typically, they are

hemmed in both by homes and businesses that have built up around them and by waterways and highways that often hug the existing facilities. Still, railroads sometimes have sufficient land within their existing rights of way to construct new facilities or to expand existing facilities, and sometimes they can purchase additional nearby property for a needed expansion or new construction project. *Ibid.*

Such projects are often vigorously opposed. It is not uncommon for an area to be zoned "residential" or "light commercial" even though an "industrial" railroad runs right through the middle of it. It is also not uncommon for "rail operations" to be omitted from the "permitted uses" prescribed by local land-use regulations for the very area in which a railroad operates. And even where local zoning or land-use regulations allow a particular rail construction project, state and local authorities can use permitting requirements for site plans, buildings, excavations, and other ostensible health and safety concerns to hold up almost indefinitely the construction, expansion, or renovation of a facility. Railroads are not averse to working cooperatively with local authorities to resolve critical local concerns—but as Congress recognized, the national interest in an efficient and economically robust interstate rail system must take precedence. See, *e.g.*, S. REP. NO. 104-176, at 6; pages 3-4, *supra*.

Petitioners' argument that it is "illogical" for the STB to have exclusive jurisdiction over certain intrastate rail facilities, even though prior Board authorization may not be needed to construct and operate those facilities (see Pet. 23), is also misplaced. As we discussed above (at 3), starting with the Staggers Act Congress began intentionally lessening the regulatory burden on the rail industry. There is nothing even novel, much less "illogical," about the idea that when Congress expressly decides to completely or partially deregulate an industry, it means it—and does not intend state or local governments to attempt to fill the "void." See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (regula-

tion of airline advertising); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988) (regulation of corporate financial structures); *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd. of Miss.*, 474 U.S. 409 (1986) (regulation of natural gas prices); see also *G&T Terminal Packaging Co.* v. *Consol. Rail Corp.*, 830 F.2d 1230 (3d Cir. 1987) (ICC's exemption from regulation of traffic in fresh fruits and vegetables does not enable shipper to bring court action asserting common-law claims for unreasonable or discriminatory rates).[15]

Petitioners also suggest that there is something "illogical" about railroads being subject to the STB's regulatory authority over their "core" railroad projects—including environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370e—but not being subject to any regulatory authority over "ancillary" railroad projects such as the development of rail facilities at Riverside. See Pet. 23-24. But petitioners misapprehend the basis for the STB's NEPA review in situations in which it has licensing authority. It is *not* based on a distinction between "core" assets and other railroad assets. Railroads have long been permitted to engage in major construction projects involving their main line tracks—including doubling or tripling the number of tracks on a line or relocating the line altogether—without obtaining any additional license from the STB and thus without STB (or state or local) environmental review. See, *e.g.*, *City of Stafford* v. *S. Pac. Transp. Co.*, ICC Fin. Dkt. No. 32395, 1994 WL 613381 (served Nov. 8, 1994), *aff'd sub nom. City of Stafford* v. *ICC*, 69 F.3d 535 (5th Cir. 1995); *City of Detroit* v. *Canadian Nat'l Ry. Co.*, 9

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[15] Of course, as we discussed above (at 18), in order to qualify for Section 10501(b) preemption, the railroad activity in question must involve rail transportation activities or facilities as defined in the ICA; petitioners' examples of a solid waste landfill and a rock quarry (see pet. 23) almost certainly would not qualify as rail transportation within the STB's jurisdiction and thus may be fully regulated by the states.

I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Auth.* v. *ICC*, 59 F.3d 1314 (D.C. Cir. 1995). STB licensing of construction projects is needed only when a railroad seeks to construct new or extended lines or connections that would give the railroad new market access. *Ibid.*; see also *Texas & Pac. Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266 (1926); *Union Pac. R.R.—Petition for Declaratory Order—Rehabilitation of Mo.-Ks.-Tx. R.R. Between Jude and Ogden Junc., TX*, STB Fin. Dkt. No. 33611, 1998 WL 525587, at *5 (served Aug. 21, 1998) ("Because we do not have jurisdiction over UP's [major relocation] project, NEPA does not apply."). The railroads have always had the freedom to improve their existing main line facilities without STB review.

What was anomalous under the law prior to the enactment of the ICCTA was that although a railroad could improve its mainline facilities in markets it already served, without environmental review either by the STB or by state and local authorities, if it made an improvement in a rail yard, added a side track, or otherwise sought to improve the ancillary facilities that are vital to rail service, state or local authorities could tie up the railroad's project with their own "intrastate" licensing review. See 49 U.S.C. § 10907(b) (1982); *Ill. Commerce Comm'n*, 879 F.2d at 922-923. That was what Congress ended with Section 10501(b)(2), which now gives the STB "exclusive" jurisdiction over such ancillary track and facilities. Far from being "illogical," Congress's action made eminent sense in light of the national goal of encouraging the development of rail facilities. See *Cities of Auburn & Kent, WA*, 1997 WL 362017, at *7 (the ICCTA precludes both STB and state permitting authority over the construction and disposition of ancillary transportation facilities), *aff'd*, *City of Auburn*, 154 F.3d 1025.

Finally, petitioners' assertion that this Court's review is warranted because the meaning of Section 10501(b) "has been fully vetted by the courts in this nation" (Pet. 25) misses

the mark. As our discussion of the cases on which petitioners rely demonstrates, cases addressing ICCTA preemption are extremely fact-specific. See, *e.g.*, page 17 & n. 12, *supra*; Pet. App. 27a. Thus, review in this case would have little implication for cases not involving pre-construction permitting programs. And to the extent petitioners mean that the courts have "fully vetted" the question whether pre-construction permitting programs are *per se* preempted as applied to activities that constitute rail transportation under the ICA and therefore fall within the STB's exclusive jurisdiction—the question presented in this litigation—the courts that have "vetted" that issue have uniformly held that such permitting systems are preempted. In the absence of any identifiable dissent on that issue, this Court's review is clearly unnecessary.

III. THE SECOND CIRCUIT WAS PLAINLY CORRECT IN HOLDING PETITIONERS' PERMITTING PROCESS TO BE PREEMPTED BY THE ICCTA.

At heart this is a very simple case. Under Section 10501(b), the STB's jurisdiction over rail "transportation" is "exclusive," and "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." For purposes of Section 10501(b), "transportation" is defined broadly, and includes "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). There is no question that Green Mountain's activities and services at Riverside are "transportation" as that term is defined in Section 10102(9). Therefore, because the STB's jurisdiction over these projects is "exclusive" (49 U.S.C. § 10501(b)), the State's District Commissions and Environmental Board cannot *also* have jurisdiction over

them. Rather, the Act 250 permitting process is expressly preempted by Section 10501(b).

Petitioners nonetheless argue that the lower court erred See Pet. 25-30. None of petitioners' arguments has any merit.

First, petitioners' assertion that the plain language of the statute supports their position (Pet. 26) is baseless. In particular, by focusing on the phrase "'with respect to *regulation* of rail transportation'" (Pet. 26 (quoting 49 U.S.C. § 10501(b) (emphasis in petition)) in one sentence of Section 10501(b), petitioners ignore entirely the fact that Section 10501(b) specifically provides that "the jurisdiction of the Board over * * * transportation by rail carrier" is "exclusive." Furthermore, to the extent the phrase "with respect to regulation of rail transportation" does limit the preemptive scope of Section 10501(b), no plausible reading of that provision could authorize a state to require a railroad to participate in a permitting process, which is inherently regulatory.

Petitioners' *in pari materia* argument (Pet. 26-27) is similarly unsuccessful. Petitioners assert that Section 11501(b), which precludes states from taxing railroads discriminatorily, implies that Section 10501(b) must be interpreted narrowly. But Section 11501 of the ICCTA merely "replace[d] without substantive change former Section 11503 [of the ICA], which forb[ade] discriminatory State taxation of rail property as an unreasonable burden on interstate commerce." H.R. REP. NO. 104-311, at 108, 1995 U.S.C.C.A.N. at 820.[16] Prior to the ICCTA, this provision would plainly have been independently necessary. Given the litigation potential had Congress *removed* a provision specifying that states are precluded from taxing railroads discriminatorily,

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[16] In the version of the ICCTA addressed in the House Report Section 11501 would have been codified as Section 11301 (see H.R. REP. NO. 104-311, at 24), but the text is identical to that codified as Section 11501 in the enacted version.

Congress clearly could have decided that it was prudent to retain this provision even if it arguably might be viewed as redundant.

By contrast, 49 U.S.C. § 11321—discussed at Pet. 27—is not redundant at all. This provision gives the STB exclusive authority over mergers and acquisitions of railroads. Such corporate transactions implicate more than rail "transportation." Preemption under Section 11321 exempts a transaction "from the antitrust laws and all other law," including even collective bargaining agreements, "as necessary * * * to carry out the transaction. See *Norfolk & W. Ry. Co.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 119 (1991). Thus, the existence of this section has no bearing on the meaning of Section 10501(b).

Petitioners' reliance on *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)—see Pet. 27-28—is also misplaced, because the statute at issue in that case differs in important ways from the ICCTA. As the *Rice* Court explained, under that statute—the United States Warehouse Act—"the Secretary of Agriculture '[was] authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen', and their personnel, [but] 'the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under [that] act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect.' *Id.* at 223-224 (quoting statute). Thus, the Act specifically gave state authorities some role in the regulation of warehouses, and state law some effect on federally regulated warehouses. The ICCTA contains no similar provisions.[17]

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[17] As the Second Circuit explained, *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987)—cited at Pet. 28—is also irrelevant here. Unlike in *California Coastal*, "what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases." Pet. App. 11a.

Finally, petitioners suggest that there should be a presumption *against* preemption in this case. See Pet. 28-30. However, as this Court has explained, "'an assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). Therefore, given the lengthy history of federal regulation of the railroad system (see pages 1-6, *supra*), there is no presumption against preemption in this case. See, *e.g.*, *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (citing *Locke*); *CSX Transp., Inc.* v. *City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000) ("There can be no doubt that just as Congress has regulated ships and vessels since the beginning of the Republic, it has similarly done so with respect to our Nation's rail system."). As we explained above (at 12), there is no question that Congress intended to leave *certain* aspects of the states' police powers not preempted by Section 10501(b)—but there is also no suggestion anywhere in the statute or its legislative history that state or local permitting systems are not *per se* preempted. Given the plain text of the statute, such an interpretation would defy reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES, AND WILLIAM H. SORRELL, AS ATTORNEY GENERAL OF THE STATE OF VERMONT,
Petitioners,

v.

GREEN MOUNTAIN RAILROAD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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QUESTION PRESENTED

As applied to railroads, are pre-construction permitting programs *per se* preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REPLY BRIEF 1

I. The STB's Jurisdiction Does Not Define The Preemptive Scope Of Section 10501(b) And Does Not Reconcile The Conflict Among The Various Courts 2

A. Jurisdiction Is Not The Proper Focus In Determining Preemption Under Section 10501(b). 2

B. The Existing Splits Among The Courts Are Not Explained Away By The Purported Absence Of The STB's Jurisdiction. 5

II. GMRC's Policy Arguments Underscore That This Case Involves An Important Question Of State And Federal Relations That Should Be Resolved By This Court 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page**

Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001) 3

Bennett v. Spear, 520 U.S. 154 (1997) 3

CSX Transp., Inc. v. v. Williams, 406 F.3d 667 (D.C. Cir. 2005).....10

Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) 8

Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005)..... *passim*

Home of Economy v. Burlington Northern Santa Fe R.R., 694 N.W.2d 840 (N.D. 2005) 9, 10

In re Appeal of Vermont Railway, 769 A.2d 648 (Vt. 2000).....5, 6, 7, 10

Iowa, Chi. & E. R.R. v. Washington County, 384 F.3d 557 (8th Cir. 2004).....9

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 10

Native Vill. of Eklutna v. Alaska R.R., 87 P.3d 41 (Alaska 2004).....5, 7, 8, 10

Potter v. United States, 155 U.S. 438 (1894).....3

United States v. Locke, 529 U.S. 89 (2000).....10

United States v. Western Pacific R.R., 352 U.S. 59 (1956).....3

Federal Constitution, Statutes and Regulations

49 U.S.C. § 10501 (1995).....*passim*

Administrative Decisions

Mid-America Locomotive and Car Repair, Inc., Petition for Declaratory Order, S.T.B. Finance Docket No. 34599, 2005 WL 1326958 (S.T.B.) (June 6, 2005) 4

Congressional Reports

H.R. Conf. Rep. 104-422, 104th Cong., 1st Sess. (1995), *reprinted in* 1995 U.S.C.C.A.N. 850 4

REPLY BRIEF

In clear conflict with the Vermont Supreme Court and other courts, the Second Circuit held below that Vermont's statewide environmental and land use statute was *per se* preempted as applied to railroads by Section 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA). App. 15a. Unlike those other courts, which determine preemption by analyzing whether state laws actually interfere with railroad operations, the Second Circuit imposes preemption even where a state law has no impact upon railroad operations.

The Second Circuit's ruling is not only inconsistent with the court decisions identified in the petition, it also leaves virtually no room in this area for states to exercise their historic police powers to protect the health and safety of their citizens and to protect their natural resources. Review by this Court is necessary to resolve the split created by the decision below on this recurring and vital issue affecting federal-state relations.

Nothing in the Brief in Opposition of Respondent Green Mountain Railroad Corporation (GMRC) undermines this conclusion. GMRC first attempts to recast the Second Circuit's decision by equating the Surface Transportation Board's jurisdiction with the scope of preemption. Next, it attempts to use its jurisdictional argument to explain away the conflict among the courts on the preemptive scope of Section 10501(b). Last, it seeks to justify the Second Circuit's broad view of preemption by citing the need for uniform federal law.

Each argument is fundamentally flawed. The ICCTA, its history and the case law establish that the scope of preemption is not defined by the STB's jurisdiction. The conflicting court opinions did not ground their preemption analysis on jurisdiction and did not employ the *per se* preemption approach adopted by the Second Circuit. GMRC's policy arguments simply fail to appreciate the role left to the states in the ICCTA and only underscore the need for this Court to provide guidance in this important area.

I. The STB's Jurisdiction Does Not Define The Preemptive Scope Of Section 10501(b) And Does Not Reconcile The Conflict Among The Various Courts.

GMRC does not seek to defend the Second Circuit's decision on the merits, but rather offers an alternate theory that preclearance permitting programs are categorically preempted whenever the STB has *jurisdiction* over the area or activity in question.[1] Opp. 1, 13, 18. This faulty proposition, which provides the foundation for all its subsequent arguments that there is no split with the decision below, is not supported by the statute or the case law interpreting it. Even the STB does not agree that preemption under Section 10501(b) is fully co-terminus with its jurisdiction.

GMRC's application of this novel theory in an attempt to reconcile the cases presented in the petition is similarly unconvincing. Those cases did not base their preemption analysis on the scope of STB's jurisdiction, nor did they use the Second Circuit's categorical approach to preemption under Section 10501(b). Instead, each determined preemption by examining whether the state or local law actually interfered with railroad operations. Thus, there remains a significant conflict among the courts that requires this Court's review.

A. Jurisdiction Is Not The Proper Focus In Determining Preemption Under Section 10501(b).

GMRC's argument that the *scope of preemption* of Section 10501(b) is identical to the STB's *jurisdiction* is without merit. Opp. 1, 13, 18. That proposition runs counter to the statutory language, the legislative history, and the views of the STB on the preemptive scope of that section.

GMRC's argument erroneously conflates the first part of Section 10501(b), which defines the STB's jurisdiction, and the last sentence, which is the preemption provision. App. 34a.

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[1] Although the Second Circuit believed that the activities at issue were under the jurisdiction of the STB, it did not justify its preemption ruling on that ground. Pet. 9; App. 9a-10a.

When an issue or activity is arguably under the STB's "exclusive jurisdiction," the matter initially must be directed to the STB for resolution.[2] It is the last sentence of Section 10501(b), however, that defines the scope of preemption. App. 34a ("Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."). Although state laws cannot be preempted under Section 10501(b) if they do not address matters within the STB's jurisdiction (*e.g.*, not "transportation"), it does not follow that all state laws that touch on rail transportation are necessarily preempted.

Indeed, if the scope of preemption were defined by the STB's "exclusive jurisdiction," the preemption provision found in the last sentence of Section 10501(b) would be entirely superfluous. App. 34a. Of course, this is analytically unsound. *Potter v. United States*, 155 U.S. 438, 446 (1894) (the presence of statutory language "cannot be regarded as mere surplusage; it means something"); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (courts must give effect to every clause).

The legislative history of Section 10501(b) underscores the importance that Congress attached to the preemption provision found in the final sentence and its limited nature. As the petition demonstrates, the language of this preemption sentence was *changed* by the Committee of Conference and included an express limit on the exclusivity of remedies—a key point that GMRC fails to acknowledge. Pet. 29-30; Opp. 6 n.3. The Committee restricted the scope of preemption by adding the phrase, "with respect to regulation of rail transportation."[3]

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[2] As Judge Posner explains in *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (citing *United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956)), "exclusive jurisdiction" is a form of primary jurisdiction that provides for initial evaluation of an issue by an agency. It is not a doctrine of preemption.

[3] The phrase "with respect to regulation of rail transportation" would

The insertion of this phrase reflected a compromise made by the Committee of Conference to competing Senate and House bills that differed as to the scope of preemption of Section 10501(b). Pet. 29. Far from being surplusage, the preemption provision and the limiting language added by the Committee of Conference was vital to the passage of the ICCTA. Contrary to GMRC's views (Opp. 18), the enacted version of Section 10501(b) was not intended to preempt everything having to do with rail transportation or under the STB's jurisdiction. The Conference Report makes plain that state police powers that do not unduly interfere with rail transportation are not preempted. *See* Opp. 6 n.3; H.R. Conf. Rep. 104-422, 104th Cong., 1st Sess., 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852.

The suggestion that preemption is measured by the scope of the STB's jurisdiction is also refuted by the STB itself. In *Mid-America Locomotive and Car Repair, Inc., Petition for Declaratory Order*, S.T.B. Finance Docket. No. 34599, 2005 WL 1326958 at *3 (S.T.B.) (June 6, 2005), the STB explains that "section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with rail transportation."[4] Thus, even the STB concentrates on the *effect* a state provision has on rail transportation—not whether the underlying activity is merely subject to its jurisdiction.[5]

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not have been inserted just to clarify that this preemption provision was referring to rail transportation. The section already twice delineated that the remedies addressed in Section 10501(b) were limited to those contained in "Part C-Rail Transportation."

[4]Admittedly, the STB would not apply this test to preclearance permitting programs because it also (and incorrectly) views them as *per se* preempted by Section 10501(b). Nonetheless, the STB approach belies GMRC's contention that the preemptive scope of Section 10501(b) is identical to the STB's jurisdiction.

[5] Indeed, if GMRC's argument were correct, it would logically lead to the preemption of state criminal laws and building codes when

GMRC's contention that preemption is determined solely by the scope of the STB's jurisdiction is simply wrong.

B. The Existing Splits Among The Courts Are Not Explained Away By The Purported Absence Of The STB's Jurisdiction.

GMRC's attempt to reconcile the cases set forth in the certiorari petition by applying its jurisdictional theory is, likewise, unpersuasive. Contrary to GMRC's arguments, both *In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000), and *Native Village of Eklutna v. Alaska R.R.*, 87 P.3d 41 (Alaska 2004), involved preclearance permitting programs that were applied to activities *within the STB's jurisdiction*. Opp. 16-20. In both cases, the courts refused to utilize the type of *per se* preemption applied by the Second Circuit and, instead, rightly analyzed whether the state or local law placed an undue burden on railroad operations.

The additional court splits described in the petition also remain. Pet. 16-21. Those courts did not adopt GMRC's jurisdictional test of preemption under Section 10501(b) and did not employ the Second Circuit's categorical bar. Like *Vermont Railway* and *Native Village*, those courts based their preemption analysis on whether the state action at issue imposed a significant burden on the railroad. Intervention by this Court to resolve this recurring issue of national importance is therefore still necessary.

1. *In re Appeal of Vermont Railway.*

GMRC mistakenly contends that because the Vermont

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applied to matters falling within the STB's jurisdiction. Yet, all parties agree that Congress did not intend to preempt such laws.

Supreme Court did not explicitly state that the salt shed and all the facilities at issue in *Vermont Railway* were under the STB's exclusive jurisdiction, the court's decision does not conflict with the decision below. Opp. 16-18. This argument is without merit and ignores the fact that both this case and *Vermont Railway* involved similar permitting programs being applied to similar salt sheds and intermodal facilities that did fall within the jurisdiction of the STB. Pet. 13-15. And, unlike the Second Circuit, the Vermont Supreme Court did not view such preclearance permitting programs as *per se* preempted by Section 10501(b). 769 A.2d at 655.

The Vermont Supreme Court's entire preemption analysis was premised on the assumption that the facility at issue was within the STB's jurisdiction.[6] The court specifically found that some conditions imposed by the City of Burlington on the salt shed and facility were preempted by Section 10501(b). 769 A.2d at 655 (affirming the lower court's decision that several conditions relating to the salt shed were not preempted, while other conditions *relating to the same salt shed* were preempted). It could not have made that determination without necessarily finding that the matter was within the STB's jurisdiction.[7]

More importantly, if GMRC's theory were correct, the Vermont Supreme Court would have started (and ended) its analysis by determining whether the salt shed or the facility fit

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[6] In fact, similar to this case, the railroad in *Vermont Railway* argued unsuccessfully that the salt shed (and its other activities at the facility) should be immune from permitting requirements as being *per se* preempted by section 10501(b). 769 A.2d at 650-51 (rejecting argument that ordinances were "preempted entirely").

[7] GMRC attempts to cast some doubt into the striking similarities between *Vermont Railway* and the ruling below by explaining (in a footnote) that the Vermont Supreme Court "may have drawn the line [for jurisdiction of the STB] in slightly the wrong place." Opp. 17-18 n.12. This only demonstrates that GMRC recognizes that there is obvious conflict between the two decisions.

within the STB's jurisdiction. On that basis, it would have decided whether it was permissible for Burlington to impose its permitting program on the railroad. Of course, that is not what happened. Instead, the court analyzed the specific permit conditions holding that the "proper approach" is to evaluate each of the conditions at issue to determine "whether they stood as an obstacle to the goals of the ICCTA." 769 A.2d. at 655. Nowhere does the court suggest that the STB's jurisdiction is determinative.

Both the Second Circuit and the Vermont Supreme Court addressed preconstruction permitting programs that were applied to similar facilities and sheds owned by similar railroads. Pet 13-15. The Second Circuit found that Section 10501(b) entirely preempts preclearance permitting programs. App. 15a. In stark conflict with that decision, the Vermont Supreme Court's test was whether any of the conditions imposed by the permitting program "interfere[d] with railroad operations." 769 A.2d at 655.

Based on the divergence between the Vermont Supreme Court and its corresponding court of appeals, this Court should grant the petition.

2. *Native Village of Eklutna.*

GMRC's argument that the split between the Second Circuit and the Alaska Supreme Court can be explained by examining STB jurisdiction, once again, misses the mark. Opp. 20. The court's preemption analysis in *Native Village* did not turn on whether the STB had jurisdiction, and it directly contradicts the Second Circuit's *per se* approach to preemption.

At issue in *Native Village* was whether the railroad could be "force[d] to obtain a conditional use permit for [a] quarry" or whether Section 10501(b) preempted Anchorage's zoning ordinances with respect to the railroad property. 87 P.3d at 56. Directly contradicting GMRC's assertion (Opp. 20) that *Native Village* involved activities that fell outside the jurisdiction of the STB, the Alaska Supreme Court expressly found that "obtaining ballast [from the quarry] for Railroad's tracks is